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No. 871

In the Supreme Court of the United States

OCTOBER TERM, 1957

ROSE FINSKY, AVRUM ANDALMAN, JOSEPH M. ANDALMAN, ET AL., PETITIONERS

v.

UNION CARBIDE & CARBON CORPORATION, A NEW YORK CORPORATION, OWNERS AND OPERATORS OF DIVISION THEREOF KNOWN AS HAYNES STELLITE CO.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The opinion of the United States District Court for the Northern District of Illinois, Eastern Division (Pet. App. 22a–23a) is not reported. The opinion of the United States Court of Appeals for the Seventh Circuit (Pet. App. 1a–21a) is reported at 249 F. 2d 449.

JURISDICTION

The judgment of the Court of Appeals was entered on November 21, 1957. A petition for rehearing, timely filed, was denied on December 26, 1957. The

petition for a writ of certiorari was filed on March 22, 1958. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether title to tungsten powder passed to petitioners by virtue of Section 203 (d) of the Federal Property and Administrative Services Act where there was no instrument purporting to pass title, no payment, and no declaration by the General Services Administration that the property contracted for is surplus.

2. Whether, in the circumstances of this case, the fact that a General Services Administration regulation directed to all agency heads and relating to the procedures to be followed by the agencies in handling strategic materials was not published in the Federal Register enables petitioners to establish authority for the sale of the tungsten powder despite non-compliance by the government contracting officer with the regulation.

3. Whether contractor inventory is exempt from stock piling under the Strategic and Critical Materials Stock Piling Act.

STATUTES INVOLVED

The pertinent provisions of Federal Property and Administrative Services Act of 1949, 63 Stat. 378, as amended, 40 U. S. C. 471, *et seq.;* the Strategic and Critical Materials Stock Piling Act, 53 Stat. 811, as amended, 50 U. S. C. 98, *et seq.;* the Federal Register Act, 49 Stat. 500, as amended, 44 U. S. C. 301, *et seq.;*

and the Administrative Procedure Act, 60 Stat. 237, as amended, 5 U. S. C. 1001, *et seq.*, appear in the appendix to the petition at pages 23a–32a.

STATEMENT

Petitioners brought this breach of contract action against respondent for its failure to deliver 173,205 pounds of tungsten powder (R. 10–17). The facts, as found by district court, are not in dispute and may be stated as follows: Respondent's Haynes Stellite division entered into contracts with the Department of Defense for production of an item for Army Ordnance (R. 142). To perform these contracts, respondent purchased approximately 972,000 pounds of tungsten powder, all but 173,205 pounds of which was used in production under these contracts (R. 106–107, 142). All of this tungsten powder was physically segregated from other tungsten powder and materials used by Haynes Stellite for other production and other contracts and separate records as to the use of this tungsten powder were maintained (R. 143). The contracts provided that title in materials acquired for the performance of the contracts vested in the government upon the making of partial payment under the contracts (R. 142, 191). Prior to March 11, 1953, when these contracts were terminated for the convenience of the government in accordance with the provisions of the contracts, the government had made partial payments under the contracts of more than $3,000,000 (R. 143).

Prior to completion of work under these contracts with the government, the principal government con-

tracting officer notified respondent that, effective March 11, 1953, the government terminated these contracts for its convenience. Thereafter, he directed respondent to dispose of all materials acquired by it under these contracts, including the 173,000 pounds of tungsten powder in issue, to advertise for and solicit bids for the sale of these materials and to sell to the high bidder, with the approval of the United States, all such materials. (R. 143-144.) In offering these materials for sale in accordance with these instructions, respondent acted as agent for the United States (R. 150).*

Early in February 1954, respondent advertised in the Waste Trade Journal, soliciting bids for the 173,000 odd pounds of tungsten powder, among other items. This advertisement was clearly captioned "Government Contract Cancellation." The advertisement also stated, "The Government reserves the right to reject any and all bids. Terms Cash, F. O. B. Kokomo plant." On February 11, 1954, respondent wrote a letter to Surplex Sales (under which name petitioners did business) inviting bids on the materials listed in the advertisement. The letter stated that "Terms of payment will be our option. (Cashiers check, certified check, or sight draft)." On February 23, 1954, petitioners submitted their bid on the tungsten powder in question, stating it was pursuant to the advertisement and the letter of solicitation. (R. 144.)

On February 23, 1954, respondent notified petitioners that Surplex Sales was the high bidder on the

*The government represents respondent in these proceedings pursuant to its cost-plus contract with respondent.

tungsten powder, that a report would be made to the government, and that petitioners would be notified if their bids were approved by the United States. Joseph Andalman, one of the petitioners, telephoned the New York Ordnance District, Department of the Army, on March 5, 1954, and was told that the Army Board of Awards had approved the high bid of Surplex Sales. The following day, two of the petitioners went to Kokomo, Indiana, where the tungsten powder was stored and met with the Haynes Stellite office manager. Pursuant to petitioners' statements that they needed some tungsten powder as a sample, respondent's office manager permitted them to take one barrel of the tungsten powder, weighing about 438 pounds, for which they gave their check for $701.68. At the same time, the office manager typed a letter stating that Surplex Sales had been awarded the tungsten in accordance with their bid of February 23, 1954, and delivered it to the petitioners. Petitioners later received a written notification from New York Ordnance, dated March 5, 1954, confirming the acceptance of the bid. In approving this bid, the government contracting officer and the Army Board of Awards had acted without submitting or offering the tungsten to the General Services Administration, which at no time gave a release or authorization for the sale. (R. 144–146.)

On March 10, 1954, New York Ordnance wired respondent that the sale of the tungsten powder to Surplex Sales was suspended and that no deliveries were to be made pending further instructions (R. 146). Respondent notified petitioners of this action

the same day (R. 146). On March 17, 1954, the New York Ordnance District instructed respondent to turn over to the government the tungsten powder in question, stating that sale of the tungsten had not been approved by the General Services Administration and that the material was to be stock-piled in the interests of national defense (R. 147, 211–212).

On cross-motions for summary judgment, the district court dismissed the action, holding that the tungsten powder was a critical material subject to stock-piling by the United States and that there was no authority for the sale of this government-owned tungsten powder (Pet. App. 22a–23a). The Court of Appeals for the Seventh Circuit affirmed. It held that the contract of sale was invalid under both the Federal Property and Administrative Services Act of 1949, 63 Stat. 378, as amended, 40 U. S. C. 471, *et seq.*, and the Strategic and Critical Materials Stock Piling Act, 53 Stat. 811, as amended, 50 U. S. C. 98, *et seq.*; that at the time the contract was cancelled no title had passed, except as to the one barrel of tungsten for which payment had been made; that the tungsten powder was contractor inventory subject to stock-piling; and that petitioners could not avoid the consequences of the governmental determination that tungsten powder was strategic and critical because this fact had not been published in the Federal Register. (Pet. App. 14a–21a.)

ARGUMENT

The court below held that, in the absence of approval from the General Services Administration, the

contract upon which petitioners sue is unenforceable since authority to contract was lacking under both the Federal Property and Administrative Services Act and the Strategic and Critical Materials Stock Piling Act. Apparently recognizing that there was no compliance with the procedural requirements of either act so that there was no actual authority for the contract, petitioners contend, first that under section 203 (d) of the Federal Property Act, 40 U. S. C. 484 (d), the routine acceptance and approval of their bid is conclusive evidence of compliance with the requirements of the Federal Property Act and, second, that the Strategic Materials Act is not applicable because the classification of tungsten powder as strategic and critical material had not been published in the Federal Register and also because the tungsten powder was not contractor inventory in the possession of the United States Army. The courts below correctly rejected these contentions. Moreover, the conflicts asserted by petitioners do not exist.

1. Petitioners do not dispute that the statutory and regulatory requisites for the sale of government-owned property were not complied with here. Nor do they challenge the rule that the United States cannot be obligated by the acts of its officers who are without authority to perform the act relied upon. See, *e. g.*, *Federal Crop Insurance Corporation* v. *Merrill*, 332 U. S. 380; *Royal Indemnity Co.* v. *United States*, 313 U. S. 289; *Whiteside* v. *United States*, 93 U. S. 247. Petitioners' contention that the failure of the

contracting officer to comply with the procedures of the Federal Property Act cannot be asserted against them rests solely on Section 203 (d) of that Act, 40 U. S. C. 484 (d), which provides:

> A deed, bill of sale, lease, or other instrument executed by or on behalf of any executive agency purporting to transfer title or any other interest in *surplus* property under this subchapter shall be conclusive evidence of compliance with the provisions of this subchapter insofar as concerns title or other interest of any bona fide grantee or transferee *for value* and without notice of lack of such compliance. [Emphasis added.]

As the court below correctly held (Pet. App. 17a–18a), this provision is not applicable to the particular facts of this case since (1) there is no instrument purporting to transfer title, (2) petitioners had not paid value (except for the one barrel sample not here in dispute), and (3) the tungsten powder had never been declared surplus property within the meaning of 40 U. S. C. 472 (g) which defines surplus as "any excess property not required for the needs and the discharge of the responsibilities of all Federal agencies, as determined by the Administrator." Petitioners cannot, and do not even attempt, to show that the tungsten powder in question was ever declared surplus by the General Services Administration as required by the Act. Thus, for three independent reasons Section 203 (d) is inapplicable here.

The alleged conflict with *United States* v. *Jones*, 176 F. 2d 278 (C. A. 9) is plainly illusory. That case involved the sale of certain universal gear joints which

had been declared surplus property to the War Assets Administration by the United States Maritime Commission. Jones had paid the agreed price, and sales memoranda, as well as bills of sale, had been issued to him prior to the time that these government agencies refused delivery. Lack of authority to consummate the sale was not claimed; instead, it was contended by the government that there was a unilateral mistake in that Jones knew the true value of the universal joints which was unknown to the government agents with whom he dealt. On the government's suit to rescind, the court held that the government could not prevail in view of section 25 of the Surplus Property Act of 1944, 58 Stat. 780, which is essentially the same as section 203 (d) of the Federal Property Act. Since the facts demonstrate that in the *Jones* case there were instruments purporting to pass title, that there was payment, and that the property sold had been declared surplus—the very factors absent here—we are unable to perceive any conflict with the present case.

2. An independent basis for the decision of the court below (Pet. App. 20a–21a) was that the contract of sale was also without legal authority because of the provisions of the Strategic and Critical Materials Stock Piling Act, 53 Stat. 811, as amended, 50 U. S. C. 98, *et seq.* This Act, which provides for the acquisition and retention of stocks of strategic materials needed for the national defense, authorizes the Director of the Office of Defense Mobilization to determine what materials are strategic and critical. 50 U. S. C. 98, 98a. Pursuant to regulations issued by the General Services Administrator, such strategic material

owned or contracted for by the United States, when determined to be surplus by the owning agency, is generally to be transferred to government stock piles, 50 U. S. C. 98e (Pet. App. 31a). The applicable regulations of the Department of Defense, section 407.606–1 of the Joint Regulations of the Armed Forces, 17 Fed. Reg. 1791, required usable property included in contractor inventory to be screened within the Department of Defense and provided further:

> (d) Items excess to the Department of Defense will be submitted as required by regulations of General Services Administration to the General Services Administration for further screening; * * *.

Section 407.606–2 provided in pertinent part:

> * * * property which must be referred by the Department of Defense Screening Agency to the General Administration, under applicable regulations of said Administration, may not be disposed of until its release in writing, or appropriate instructions for its distribution within the Government, have been received from General Services Administration.

And section 597.603–3 of the Regulations of the Department of the Army which appeared at 19 Fed. Reg. 402, on January 22, 1954, provided in pertinent part:

> * * * All reportable Contractor inventory * * * shall be screened concurrently with the Department of Defense screening agency and with General Services Administration.

In cooperation with the Munitions Board of the Department of Defense, the General Services Ad-

ministration also promulgated its Emergency Procurement Regulation No. 1, effective September 14, 1951 (Pet. App. 32a–37a). This regulation, which is directed to the heads of federal agencies, has not been published in the Federal Register. Section 3 thereof deals with agency reports of excess strategic materials to the General Services Administration, while Section 4 relates to the actions that the Administration may take in respect to materials so reported. In addition, Appendix A of this regulation enumerates the materials found to be strategic by the Munitions Board. It is undisputed that tungsten powder is listed in this appendix.

Petitioners contend that because this Emergency Procurement Regulation No. 1 was not published in the Federal Register respondent is estopped to urge that tungsten powder was a strategic material as well as that its sale was without authority. This argument fails, we submit, for two reasons. First, as held by the court below (Pet. App. 20a), neither the Federal Register Act nor the Administrative Procedure Act require publication of such a regulation. Section 5 of the Federal Register Act requires the publication of "such documents or classes of documents as may be required so to be published by Act of the Congress". 49 Stat. 501, as amended, 44 U. S. C. 305 (Pet. App. 25a). Section 3 of the Administrative Procedure Act, 60 Stat. 238, 5 U. S. C. 1002, provides in pertinent part:

> Except to the extent that there is involved * * * (2) any matter relating solely to the internal management of an agency—

> (a) *Rules.*—Every agency shall separately state and currently publish in the Federal Register * * * (3) substantive rules adopted as authorized by law and statements of general policy or interpretations formulated and adopted by the agency for the guidance of the public * * *. No person shall in any manner be required to resort to organization or procedure not so published.

These are the only statutory provisions which petitioners point to as requiring publication. Since the unpublished regulation involved relates only to the internal management of government agencies and, in any event, was not adopted for the guidance of the public, there was no need for publication. See *Brownell* v. *Schering Corporation,* 129 F. Supp. 879, 905 (D. N. J.), affirmed, 228 F. 2d 624 (C. A. 3), certiorari denied, 351 U. S. 954.

Even if publication of this regulation were required, the absence of publication would not change the finding that there was no authority for the sale of the tungsten powder in question. As has been stated by the Ninth Circuit, the "clear purpose of Section 3 (a) [of the Administrative Procedure Act] is to provide a *shield* for a petitioner before the Board, or other agency, to protect him from being penalized for failing to resort to unpublished methods of procedure. It is not a *sword* by which a petition can strike down the agency's order, on the ground that the agency has not authorized itself to issue that type of order, by publishing a statement in the Federal Register!" *Foreman and Clark, Inc.* v. *National*

Labor Relations Board, 215 F. 2d 396, 410, certiorari denied, 348 U. S. 887. This emphasis on the purely defensive nature of Section 3 (a) is also supported by the legislative history of the provision. See Sen. Rept. No. 752, 79th Cong., 1st Sess., p. 12; *Legislative History of the Administrative Procedure Act,* Sen. Doc. No. 248, 79th Cong., 2d Sess., p. 356; Attorney General's Manual on the Administrative Procedure Act, pp. 20–22 (1947).

The foregoing discussion makes it apparent that there is no conflict with *Hotch* v. *United States,* 212 F. 2d 280 (C. A. 9). In that case, Hotch was convicted of fishing in violation of a regulation of the Department of the Interior closing some Alaskan waters to commercial fishermen for certain hours. The regulation had not been published in the Federal Register. Holding the unpublished regulation ineffective against Hotch, the court stressed the fact that a person may not be criminally prosecuted for violation of law which has not been duly enacted. But as the same court pointed out in the *Foreman* case, *supra,* the fact that the failure to publish a regulation may be used as a shield as in *Hotch,* would not permit the lack of publication to confer a positive benefit such as petitioners seek here.

3. There is also no merit to the contention that the tungsten powder in question was exempt from stock piling because it was contractor inventory of which the owning agency had not taken possession. Neither the language of the Strategic and Critical Materials Stock Piling Act nor the intent of Congress permits

such a result. Section 6 of the Strategic Materials Act, 53 Stat. 812, as amended, 50 U. S. C. 98e, provides in pertinent part:

> (a) Pursuant to regulations issued by the General Services Administration, every material determined to be strategic and critical pursuant to section 98a of this title, which is owned or contracted for by the United States or any agency thereof, including any material received from a foreign government * * * shall be transferred by the owning agency, when determined by such agency to be surplus to its needs and responsibilities, to the stock piles * * *. There shall be exempt from this requirement such amount of any material as is necessary to make up any deficiency of the supply of such material for the current requirements of industry as determined by the Secretary of Commerce. There shall also be exempt from this requirement (1) any material which constitutes contractor inventory if the owning agency shall not have taken possession of such inventory, (2) such amount of any material as the Munitions Board determines (i) are held in lots so small as to make the transfer thereof economically impractical; or (ii) do not meet or cannot economically be converted to meet, stock pile requirements determined in accordance with section 98a of this title. * * *

The first sentence of this section makes it mandatory that all strategic materials which are surplus to an agency's need be transferred to the stock piles. The exemptions which follow evidently serve the purpose of permitting the Act to be administered so that the

interests of industry as well as economic practicability may be considered in determining when a strategic material should be stock-piled. But while an element of discretion is thus provided by these "exemptions," the General Services Administration is not precluded from stock-piling such materials where the interests of national defense are paramount.

Petitioners' interpretation of Section 6 of the Strategic Materials Act would preclude the stock-piling of any contractor inventory since by definition "contractor inventory" is not in the possession of the government.[1] Not only is this inconsistent with the language and purpose of the statute but it does not comport with the Congressional interpretation of the Act. When the definition of "contractor inventory" was amended in 1952, 66 Stat. 593, so as to include any property which the Government "has the option" to take over, the House Report explaining this amendment said:

> * * * [The amendment] would also make the "option" property more clearly subject to regulation by the Administrator whereby it can be brought within the Federal utilization program. For example, strategic and critical materials available to the Government under the contract provision can be forbidden to be re-

[1] See definition in GSA's Emergency Procurement Regulation No. 1, Section 2 (b) (Pet. App. 33a) which adopts 40 U. S. C. 472 (k). The contractor inventory exemption from stock piling first appeared in Section 22 of the Surplus Property Act of 1944, 58 Stat. 776. The definition of contractor inventory in Section 3 (f) that Act, 58 Stat. 767, did not differ in any respect material to this case.

> tained by the contractor so that these materials may be acquired by the Government and used in its defense supply procurement program [H. R. Rep. No. 1524, 82d Cong., 2d Sess., p. 8 (1952)].

These considerations are sufficient to refute the contention that Congress, in effect, intended to exempt all strategic materials in contractor inventory from stock-piling for national defense.

CONCLUSION

For these reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

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